COMPUTERLAND CORP.

v.

YEW SENG COMPUTERS PTE. LTD.

COURT OF APPEAL, SINGAPORE
YONG PUNG HOW CJ
LAI KEW CHAI J
LP THEAN J
[CIVIL APPEAL NO. 54 OF 1985]
27 AUGUST 1991

CIVIL PROCEDURE: *Anton Piller order - Grant of - Circumstances under which will be granted - Meaning of grave danger or real possibility - Whether essential to have inspection - Grave danger that vital evidence will be destroyed - Balancing of interest of right to recover property or to preserve important evidence against violation of privacy of a party who has no opportunity to put forward his case.*

CONTRACT: *Breach - System franchise agreement - Whether breach of contractual obligations constitute grounds for an Anton Piller order.*

On 20 May 1985, the appellants who had in 1979 entered into a system franchise agreement with the respondents for the operation of a computerland retail outlet in Singapore, commenced action against the respondents, claiming underpaid royalties. This agreement was however terminated on 2 May 1985. The appellants also obtained an Anton Piller order permitting the appellants to enter the respondents' premises and seize various materials and also an injunction restraining the respondents from using the Computerland name. On 25 May 1985, the respondents applied to discharge the injunction and for an order for the return of all documents and materials removed by the appellants; they also applied for damages.

On 4 June 1985, Coomaraswamy J ordered the injunction to be suspended until 28 June and also issued a comprehensive order relating to the appellants returning the seized documents to the respondents. The appellants now appeal against this order. Before the hearing of the appeal, however, the parties reached an amicable settlement with regard to the use of the Computerland name. The appeal for a continuation of the injunction therefore became unnecessary.

Held:

[1] On the evidence, the appellants were not entitled to the Anton Piller orders which they had obtained. There was no evidence of a "grave danger" or a "real possibility" that the respondents would or might destroy any document in their possession. Nor was there any evidence of any dishonest conduct on the part of the respondents, since such breaches of the agreement are not synonymous with dishonesty. The fact that the respondents had thus behaved wrongfully in their commercial relationship with the appellants, does not necessarily justify the granting of an Anton Piller order.

[2] The appellants in this action were seeking, *inter alia*, an account of all sales made by the respondents and an account of what was due to them in respect of royalties payable to them. It was the respondents who would need to show that the appellants were not entitled to more royalties than the respondents had reported, and in such an exercise if the respondents could not produce the documents required, the Court could and would rightly make every presumption in favour of the appellants.

[3] In view of its draconian nature, an Anton Piller order has a very drastic effect and far-reaching consequence on the respondents if it is executed. It should be granted only in exceptional cases.

[4] Experience shows that in Singapore too free a use has been made by plaintiffs of the Anton Piller order. All too often such orders have been applied for without sufficient grounds and on bare allegations without any evidence in support. It is imperative that in any application for the order, the applicant seeking it must satisfy the stringent requirements laid down in the *Anton Piller* case and the Court must scrutinise with care the evidence produced and must be circumspect in granting such an order.

[5] The Court should always balance "the plaintiff's right to recover his property or to preserve important evidence" against "violation of the privacy of a defendant who has had no opportunity to put his side of the case". This should be so even in a case where there is strong evidence of any wrongdoing on the part of the defendant, depending of course on the nature of such wrongdoing, and such order should only be granted if the Court is satisfied that there is a real risk of justice being frustrated or thwarted.

[Anton Piller Order ought not to have been granted; Coomaraswamy J's order varied.]

Cases referred to:
Yousif v. Salama & Anor. [1980] 1 WLR 1540 ***(cons)***
Anton Piller K.G. v. Manufacturing Processes Ltd. [1976] Ch 55 B ***(Cons)***
Booker McConnell plc. v. Plascow & Ors. [1985] RPC 425 ***(cons)***
Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] FSR 289 ***(foll)***
Columbia Pictures Industries Inc. Ors. v. Robinson & Ors. [1987] Ch 38 ***(foll)***
Lock International Plc. v. Beswick & Ors. [1989] 3 All ER 373 ***(cons)***
Dormeuil Freres S.A v. Nicolian International (Textiles) Ltd. [1988] 3 All ER 197 ***(cit)***

For the appellants - Helen Yeo; M/s. Chor Pee & Co
For the respondents - Cheong Gay; M/S. De Souza & Cheong

JUDGMENT

LP Thean J:

The appellants are a company incorporated in the State of California, United States of America, and carry on the business of a franchiser of computer system retail outlets under the business and franchise name, "Computerland". They operate a "system franchise" which is to group all small outlets under one name and mark of "Computerland", and make bulk purchases of computers and related products from manufacturers such as IBM, Apple and Compaq and resell them to their franchisees at bulk discounted prices. The respondents are a company incorporated in Singapore.

On 10 May 1979 the appellants and the respondents entered into a "system franchise" agreement ("the agreement"), whereby the appellants granted to the respondents, subject to the terms and condition therein, the right to operate a computer system retail outlet in Singapore under the name and mark of "Computerland" and using the logo, design, decor and business methods of "Computerland". It is unnecessary to set out in any detail the terms and conditions of the agreement. Suffice it here to say that under the agreement, the respondents agreed to pay to the appellants a monthly royalty based on the respondents' gross revenue resulting from the operation of their store and also to pay to the appellants the product supplied by them at their costs plus a mark-up. The agreement required the respondents to keep accounts, to send perodical reports to the appellants and to allow the

appellants access to the respondents' business and financial records and to allow an independent audit. Pursuant to the agreement, the respondents opened a store at Clifford Centre, Singapore in August 1979.

On 27 March 1984, and on several occasions thereafter, the appellants requested an audit to be carried out but the respondents refused. On 7 December 1984, the appellants sent to the respondents a notice of termination of the agreement. Following that, a telephone conversation between the appellants' chairman, William H Millard, and the respondents' managing director, Tan Kok Meng took place, as a result of which the notice of termination was rescinded. Further discussions took place between other representatives of the appellants and Tan. Then on 14 March 1985, the appellants sent to the respondents a second termination notice setting out the breaches and notifying them that the default might be cured by the respondents paying the royalty due to the appellants arising from the reported sales and allowing a chartered accountant to enter and carry out an audit and investigation. Enclosed in the letter was an invoice for US$258,540 being an estimate by the appellants of the amount of royalty the respondents had underpaid arising from the respondents' under-reporting sales. About ten days later, on 26 March 1985, the notice of termination was withdrawn after the appellants' representative, Michael A McConnell, spoke to Tan. The parties sought to come to an amicable settlement. However, at a meeting on 4 April 1985, Tan refused to agree to an independent audit or allow access to the accounts. It was said that Tan admitted that the respondents had under-reported sales but claimed that the respondents were justified in doing so because they had been overcharged by the appellants. Following the meeting, Tan despatched telexes to the appellants notifying them that the respondents intended to make certain claims against them and that the respondents would stop remitting further payments to them. The appellants thereupon, by a letter dated 2 May 1985, gave notice to the respondents that the agreement had been terminated by the respondents' repudiation and that the appellants were therefore discharged from further performance of the agreement.

On 20 May 1985, the appellants took out a writ of summons against the respondents claiming that the respondents were in breach of the agreement in that they had under-reported sales, underpaid royalties due to the appellants, refused to give the appellants financial information and access to accounts and refused to allow an audit of the accounts. On the same day, the appellents applied *ex parte* and obtained an Anton Piller order against the respondents permitting the appellants' representative to enter the respondents' premises at three different locations, including the showroom at Clifford Centre, #02-20, and also an interim injunction restraining the respondents from using the "Computerland" name, mark, logo, slogan or any related or similar name and mark owned by the appellants. Subsequently, the appellants found that the respondents had another office at #17-02, Clifford Centre and, accordingly, on 23 May 1985 the appellants again applied *ex parte* and obtained an additional Court order for leave to enter the defendants' premises at #17-02 Clifford Centre. The two Anton Piller orders were executed.

On 25 May 1985, the respondents took out an application to discharge the injunction and to obtain the return of all documents and materials removed by the appellants from the respondents' places of business pursuant to the Anton Piller orders and for an order for assessment of damages. On June 4 1985, the application was heard before Coomaraswamy J, and at the conclusion, he made an order suspending the injunction until 28 June 1985, when the appellants' motion for its continuation would be heard, and in respect of the documents obtained by the appellants pursuant to the Anton Piller orders he made a very comprehensive order which, so far as relevant, is as follows:

2(a) The plaintiffs do forthwith at their own expense return to the defendants at the location nominated by the defendants all documents or materials ("the documents") taken from the various premises of the defendants pursuant to or in purported pursuant to para. 2 of the order of Court dated 20 May 1985 and the order of Court dated 23 May 1985 ("the *Yousif v. Salama Orders*"), such return to be completed by 12:00 noon on Thursday 6 June 1985.

(b) All copies of any of the documents made by the plaintiffs' solicitors and now in the plaintiffs' solicitors' possession be delivered to the defendants' solicitors for destruction.

(c) Notwithstanding para. 2(b) above, pending appeal by the plaintiffs against the whole of this order or any part thereof all copies of any of the documents made by the plaintiffs' solicitors be sealed and delivered by 12:00 noon Thursday, 6 June 1985 to the defendants' solicitors on the defendants'solicitors undertaking to keep the documents in safe custody and not to unseal the said documents or to destroy or part with the possession thereof until the disposal of the plaintiffs' appeal.

(d) The plaintiffs by their solicitors do destroy all copies of any of the documents which were not sealed up under sub-para. 2(b) above due to inadvertence or any other reason whatsoever.

(k) There be an inquiry as to damages (if any) suffered by the defendants in the execution of the *Yousif v Salama Orders* and that the plaintiffs do pay to the defendants such amount as shall be found due to the defendants in respect thereof as assessed by the Registrar of the Supreme Court, Singapore and the costs of such assessment.

(l) That the plaintiffs by it directors, officers, servants or agents or otherwise do make no further use whatsoever of any information contained in the documents or materials as the plaintiffs may have obtained.

Against the decision of the learned Judge, the appellants appealed. Before the appeal was heard, certain supervening events had occurred. First, on 30 December 1985 the parties reached an agreement with regard to the use of the name "Computerland", and in consequence there was no necessity for the appellants to pursue the application for a continuation of the injunction. Secondly, on 24 September 1986, the appellants on an application before the Assistant Registrar obtained a summary judgment against the respondents. The respondents appealed against the Assistant Registrar's decision but the appeal was dismissed by Chan Sek Keong J on 23 April 1987. The respondents further appealed against the learned Judge's decision, but on the date of hearing on 23 January 1989, the appeal was withdrawn. Since then, the appellants have proceeded with the accounting proceedings pursuant to the summary judgment.

The appeal against Coomaraswamy J's decision eventually came on for hearing before us, and at the conclusion we varied the order made by the learned Judge to the extent as follows: (i) that the documents delivered by the appellants' solicitors to the respondents' solicitors and retained by the latter ought not to be destroyed but be retained for the purpose of discovery in the accounting proceedings pursuant to the summary judgment, and (ii) that there be no inquiry as to damages and accordingly para. 2(k) of the order was set aside. As for costs, we allowed half to the costs of the appeal to the respondents. We now give our reasons.

The learned Judge referred to the two Anton Piller orders as *"Yousif v. Salama"* orders - The name was derived from the case of *Yousif v. Salama & Anor* [1980] 1 WLR 1540. Counsel for the appellants relied on that case and submitted that the appellants had satisfied the requirements for granting an Anton Piller order. We rejected this argument. In *Yousif v. Salama & Anor*. an agreement was made between the plaintiff and the two defendants whereby the plaintiff was to procure certain business to be placed with the second defendant,

a company owned and controlled by the first defendant, and the commission due to the second defendant on such business was to be shared between him and the defendants. Several transactions took place over a period of two years and a statement of account was rendered by the defendants showing the sum due to the plaintiff. Business then continued. In March 1980, the plaintiff went with the first defendant to the second defendant's office and went through the accounts. Two files were produced containing various documents; so also was a desk diary. The plaintiff, being very anxious about the matter, brought proceedings in Court for the sum due to him. He took out a writ and had it served on the defendants. Thereafter he applied *ex parte* for an Anton Piller order which was refused by Robert Goff J. On appeal, the Court of Appeal by a majority reversed the order and granted him the Anton Piller order but restricted it to the two files and the desk diary which was seen by the plaintiff previously. In his judgment, Lord Denning MR said, at p. 1542:

> In many cases such an order would not be granted. But in this case there is evidence (if it is accepted) which shows the first defendant to be untrustworthy. The plaintiff has a legitimate fear that the documents will be destroyed. In the circumstances, it seems to me that it would be proper to make an Anton Piller order to the effect that the plaintiff's solicitor would be enabled to go and get the documents - Take them into his personal custody for a while - Make copies of them - And then return the originals to the defendants.
>
> These files here are not the subject matter of the action. But they are the best possible evidence to prove the plaintiff's case. There is a genuine fear that, if the plaintiff waits till after the application is heard, the first defendant may destroy the documents before the date of hearing. That is the sort of danger which the Anton Piller order is designed to prevent.

Brightman LJ, the other member of the Court, also held that it was appropriate to grant the order as there were grounds for saying that the documents sought were essential to the plaintiff's case and that there was sufficient evidence to justify the court concluding that the documents were at risk. Donaldson LJ, however, dissented vigorously. Holding that the circumstances did not justify the granting of an Anton Piller order, he said that the relationship between the parties and their disputes were very common and that the defendant was an accounting party, in which case the ordinary order would be one either for an account with the usual inquiries or for discovery. He said, at p. 1543:

> I regard that [i.e. the granting an Anton Piller order] as a very serious invasion of the rights of the defendants. Of course there is precedent for doing it. It is in the Anton Piller line of cases. The essential feature of those cases, as I understand them, is that there is a very clear *prima facie* case leading the Court to fear that the defendant will conceal or destroy essential evidence in the grossest possible contempt of the court - And this is an important second limb - That should he do so the whole processes of justice will be frustrated because the plaintiff will be left without any evidence to enable him to put forward his claim. In that limited class of case I, for my part, think that the Anton Piller order is absolutely right. No Court can stand by and see the processes of justice totally frustrated by a defendant in contempt of its order. But I cannot find anything in this case which brings it within that category. I regard the evidence of an intention to destroy the documentation as flimsy in the extreme. It is based upon an allegation of forgery in the indorsement of a cheque. This has nothing whatever to do with the destruction of documents which the plaintiff says that he fears.

Later he said, at pp. 1543-1544:

> Even if I am wrong about that, it is quite clear, as I see it, that if these documents are destroyed the plaintiff's case will be in no way weakened. In every agency case of this type the starting point of the calculation of commissions is orders placed through the plaintiff and money passing through the hands of the plaintiff or those with whom he could get in touch without any difficulty. The plaintiff can show quite easily how much money has been paid

for goods and services which he has procured for the defendants. Starting from that point, it is the defendants who will need the documents in order to prove that the plaintiff is not entitled to a very large commission. And, if the defendants cannot produce the documents, the Court will rightly make every presumption in favour of the plaintiff.

Again, it is not a case where there are no documents relating to this type of business so that the plaintiff, so to speak, starts from scratch. The plaintiff has the documents for 1978 and can demonstrate the rate of commission which was payable for that year. There is no suggestion that the basis was altered for 1979. Given the cash flow for 1979, which can be proved without difficulty, I can see no problem for him in proving his *prima facie* entitlement to commission. The problems will be all for the defendants.

As I say, I think this is a Draconian power which should be used in only exceptional cases.

I have considered, of course, whether, as was suggested in argument, it can rightly be said that no harm is done to an honest man by taking discovery from him when eventually he would have been ordered to give it. I think that great harm is done. The people of this country are entitled not to have their privacy and their property invaded by a Court order except in very exceptional circumstances. That, in my judgment, is not this case.

In our respectful view, though the majority of the Court of Appeal exercised their discretion in granting the order, the dissenting judgment of Donaldson LJ was more consonant with authorities, and in particular, the decision of the Court of Appeal in *Anton Piller K.G. v. Manufacturing Processes Ltd.* [1976] Ch 55, from which the name of the order was derived. In that case, the plaintiffs, who were German manufacturers of equipment, complained that the defendants, who were their agents, were passing secret information about their equipment to other German manufacturers. The plaintiffs sought and obtained an ex parte interim injunction restraining the defendants from infringing their copyrights and disclosing the confidential information. They also sought an order permitting them to enter the defendants' premises to remove documents into their solicitors' custody. This part of the application was refused by Brightman J but on appeal was allowed. Lord Denning MR in his judgement said, at pp. 60-61:

Accepting such to be the case, the question is in what circumstances ought such an order be made. If the defendant is given notice beforehand and is able to argue the pros and cons, it is warranted by that case in the House of Lords and by RSC, O. 29, r. 2(1) and (5). But it is a far stronger thing to make such an order *ex parte* without giving him notice. This is not covered by the Rules of the Supreme Court and must be based on the inherent jurisdiction of the Court. There are one or two old precedents which give some colour for it, *Hennessy v. Rohmann, Osborne & Co.* [1877] WN 14, and *Morris v. Howell* [1888] 22 LR Ir. 77, an Irish case. But they do not go very far. So it falls to us to consider it on principle. It seems to me that such an order can be made by a Judge *ex parte*, but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties: and when, if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated: and when the inspection would do no real harm to the defendant or in his case.

Ormrod LJ said, at pp. 61-62:

I agree with all that Lord Denning MR has said. The proposed order is at the extremity of this Court's powers. Such orders, therefore, will rarely be made, and only when there is no alternative way of ensuring that justice is done to the applicant.

There are three essential pre-conditions for the making of such an order, in my judgment. First, there must be an extremely strong *prima facie* case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the

> defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application *inter partes* can be made.

Shaw LJ, the third member of the Court, said, at p. 62:

> The overriding consideration in the exercise of this salutary jurisdiction is that it is to be resorted to only in circumstances where the normal processes of the law would be rendered nugatory if some immediate and effective measure was not available. And, when such an order is made, the party who has procured the Court to make it must act with prudence and caution in pursuance of it.

The phrase "a real possibility" was clarified by Dillion LJ in *Booker McConnell plc v. Plascow & Ors.* [1985] RPC. 425 at p. 441, where he said:

> The phrase "a real possibility" is to be contrasted with the extravagant fears which seem to afflict all plaintiffs who have complaints of breach of confidence, breach of copyright or passing off. Where the production and delivery up of documents is in question, the Courts have always proceeded, justifiably, on the basis that the overwhelming majority of people in this country will comply with the Court's order, and that defendants will therefore comply with orders to, for example, produce and deliver up documents without being necessary to empower the plaintiff's solicitors to search the defendant's premises.

Reverting to the instant case, we are in agreement with the learned Judge that the appellants on the evidence produced before the Court were not entitled to the two Anton Piller orders which they had obtained. In the lengthy affidavit affirmed by Michael A McConnell on 16 May 1985, which was the affidavit relied upon in the application for the Anton Piller orders, there was no evidence that there was a "grave danger" or "real possibility" that the respondents would or might destroy any documents and other evidence in their possession. Nor did it show any dishonest conduct on the part of Tan or other directors of the respondents in charge of the matter. It was evident that the parties were engaged in ongoing disputes for some years, and there was no suggestion that in relation to these disputes the respondents had at any stage destroyed or threatened to destroy any documents or records. In that affidavit Michael A McConnell alleged breaches of the agreement by the respondents and in particular the respondents' underpayment of royalties, their under-reporting of sales, their failure to furnish accounts, and their refusal to allow the appellants' accountant access to the accounting records of the respondents or to allow an audit. All such breaches of the agreement are, as the learned Judge said, not synonymous with dishonesty and are no indication of any intention on the part of the respondents to destroy any evidence and thus frustrate the whole process of justice. The fact that the respondents had thus behaved wrongfully in their commercial relationship with the appellants, assuming that what was alleged by Michael A McConnell was substantially true, does not necessarily justify the granting of an Anton Piller order.

We also agreed with the learned Judge that the appellants in this action were seeking, *inter alia*, an account of all sales made by the respondents and an account of what was due to them in respect of royalties payable to them. It was the respondents who would need to show that the appellants were not entitled to more royalties than the respondents had reported, and in such an exercise if the respondents could not produce the documents required the Court could and would rightly make every presumption in favour of the appellants: see the judgment of Donaldson LJ in *Yousif v. Salama & Anor*. at pp. 1543-1544. On the material the appellants produced, the Anton Piller orders ought not to have been granted.

We cannot over-emphasize the draconian nature of the Anton Piller order and the very drastic effect and far-reaching consequences such an order has on a defendant when it is executed. It should be granted only in exceptional cases. In *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] FSR 289 at pp. 291-292, Browne-Wilkinson J said:

> I would emphasize that the effect of an order if made is far-reaching. First, a defendant has had no opportunity to present his case to the Court or to bring matters to the Court's attention which might alter the Court's view of the matter. It is an extreme thing for a Court to make a severe order without even giving the defendant an opportunity to be heard. Secondly, the execution of the order involves an invasion of the rights of privacy: to the extent that the jurisdiction is exercised it is incompatible with the view that an Englishman's home is his castle. Thirdly, if not very carefully watched, it is capable of being abused. A plaintiff engaged in trade who obtains an order enabling him to enter the business premises of a competitor and search that competitor's documents may obtain a quite unfair and wrongful commercial advantage. Therefore, although the jurisdiction is a very valuable remedy in a proper case, the Courts are, and must continue to be, very circumspect in the use that is made of the procedure.

More recently, in *Columbia Picture Industries Inc. & Ors. v. Robinson & Ors.* [1987] Ch 38, Scott J demonstrated in very vivid terms the serious practical effects and far-reaching consequences produced by an Anton Piller order. He said, at pp. 72-73:

> But notice the position that Anton Piller procedure, and its logical consequences produces: a mandatory order is made in the absence of the respondent and in secret; it is served upon and executed against the respondent without his having any chance to challenge the correctness of its grant or to challenge the evidence on which it was granted.
>
> Now let the possible and, perhaps, probable effects of an Anton Piller order be considered. The order is served and executed. If the order is in the terms of the order in the present case and is executed as it was in the present case, there will be a wholesale removal of all business material, whether stock-in-trade, bank statements, cheque books or correspondence. The continuance of the business by the respondent to the order is thereby made impossible. How can a business be continued without records? How can it be continued without stock-in-trade? It will be recalled that, in the present case, the order authorised the removal of, *inter alia*, the video recorders at 8, Frederick Street. They were not, in the event, removed but, if they had been, the whole of Mr Robinson's copying business would for that reason alone have been closed down. It is customary, on account of the Mareva injunction accompanying Anton Piller orders, for a copy of the order to be served on the respondent's bankers. That was done in the present case. The almost certain effect of that being done will be that the bankers will decline to allow any further credit to the respondent. The order will throw such a question mark over the business of the respondent as to make any other course commercially imprudent and, therefore, unlikely. In the present case, Barclays Banks, upon service of the order, refused to allow the defendants any further credit.
>
> The service and execution of an Anton Piller order is likely to have on a respondent a personal as well as a commercial effect. Anton Piller orders are often granted not simply in respect of business premises but in respect of the respondent's home. He is required, on pain of committal, to open the doors of his house to the plaintiffs' representatives and to permit a search of the contents thereof. The plaintiffs and their representatives are at liberty to search and rummage through the personal belongings of any occupant of the house and to remove the material they consider to be covered by terms of the order. The traumatic effect and the sense of outrage likely to be produced by an invasion of home territory in the execution of an Anton Piller order is obvious.

Later he said, at p. 76:

> But a decision whether or not an Anton Piller order should be granted requires a balance to be struck between the plaintiff's need that the remedies allowed by the civil law for the breach of his rights should be attainable and the requirement of justice that a defendant should not

> be deprived of his property without being heard. What I have heard in the present case has disposed me to think that the practice of the Court has allowed the balance to swing much too far in favour of plaintiffs and that Anton Piller orders have been too readily granted and with insufficient safeguards for respondents.

We respectfully agree with the observations made by these two judges. It is also our experience that in Singapore too free a use has been made by plaintiffs of the Anton Piller orders, and all too often such orders have been applied for without sufficient grounds and on a bare allegation, without any evidence in support, that there was a fear or likelihood that material evidence would be destroyed or removed or made to disappear by the defendants. Our Court has also, on some occasions, responded favourably to such applications and, in the words of Scott J, has allowed the balance to swing in favour of plaintiffs. It is therefore imperative that on every application for an Anton Piller order the party seeking it must satisfy the stringent requirements laid down in the *Anton Piller* case and the Court must scrutinize with care the evidence produced and must, in the words of Browne-Wilkinson J, be very circumspect in granting such an order.

In this connection, it is also helpful to refer to the case of *Lock International plc v. Beswick & Ors.* [1989] 3 All ER 373. There, eight employees of the plaintiff who held key positions resigned and joined a company, S. Ltd., which was started by a former managing director of the plaintiff's company. S. Ltd. manufactured and marketed metal detectors in competition with the plaintiff. In the course of designing new metal detectors, S. Ltd. purchased three of the plaintiff's detectors which were used or cannibalised for the purpose of testing S. Ltd's new design. The plaintiff issued a writ against the eight employees and S. Ltd., and took out a motion for an injunction restraining the defendants from making use of its trade secrets and confidential information. The plaintiff also obtained and executed an Anton Piller order against the defendants under which the plaintiff searched S. Ltd.'s premises and the homes of three of the individual defendants and removed not only documents belonging to the plaintiff or confidential information but also virtually all of S. Ltd's drawings, commercial documents, computer records and prototypes. Upon application by the defendants, Hoffmann J held that the evidence adduced by the plaintiff did not justify the making of an Anton Piller order and accordingly he discharged it. He said, at pp. 383-384:

> Anton Piller orders are frequently sought in actions against former employees who have joined competitors or started competing businesses of their own. I have learnt to approach such applications with a certain initial scepticism. There is a strong incentive for employers to launch a pre-emptive strike to crush the unhatched competition in the egg by causing severe strains on the financial and management resources of the defendants or even a withdrawal of their financial support. Whether the plaintiff has a good case or not, the execution of the Anton Piller order may leave the defendants without the will or the money to pursue the action to trial in order to enforce the cross-undertaking in damages.
>
> Some employers seem to regard competition from former employees as presumptive evidences of dishonesty. Many have great difficulty in understanding the distinction between genuine trade secrets and skill and knowledge which the employee may take away with him. In cases in which the plaintiff alleges misuse of trade secrets or confidential information concerning a manufacturing process, a lack of particularity about the precise nature of the trade secrets is usually a symptom of an attempt to prevent the employee from making legitimate use of the knowledge and skills gained in the plaintiff's service.

Later, he said, at p. 384:

> Even in cases in which the plaintiff has strong evidence that an employee has taken what is undoubtedly specific confidential information, such as a list of customers, the Court must employ a graduated reponse. To borrow a useful concept from the jurisprudence of the European

Community, there must be proportionality between the perceived threat to the plaintiff's rights and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationships does not necessarily justify an Anton Piller order. People whose commercial morality allows them to take a list of the customers with whom they were in contact while employed will not necessarily disobey an order of the Court requiring them to deliver it up. Not everyone who is misusing confidential information will destroy documents in the face of a Court order requiring him to preserve them.

In many cases it will therefore be sufficient to make an order for delivery up of the plaintiff's documents to his solicitor or, in cases in which the documents belong to the defendant but may provide evidence against him, an order that he preserve the documents pending further order, or allow the plaintiff's solicitor to make copies. The more intrusive orders allowing searches of premises or vehicles require a careful balancing of, on the one hand, the plaintiff's right to recover his property or to preserve important evidence against, on the other hand, violation of the privacy of a defendant who has had no opportunity to put his side of the case. It is not merely that the defendant may be innocent. The making of an intrusive order *ex parte* even against a guilty defendant is contrary to normal principles of justice and can only be done when there is a paramount need to prevent a denial of justice to the plaintiff. The absolute extremity of the Court's powers is to permit a search of a defendant's dwelling house, with the humiliation and family distress which that frequently involves.

These observations are, once again, a salutary reminder of the extreme care the Court should and must exercise in granting an Anton Piller order, always balancing "the plaintiff's right to recover his property or to preserve important evidence" against "violation of the privacy of a defendant who has had no opportunity to put his side of the case". This should be so even in a case where there is strong evidence of any wrongdoing on the part of the defendant - depending of course on the nature of such wrongdoing - and such order should only be granted if the Court is satisfied that there is a real risk of justice being frustrated or thwarted.

In the instant case, we are clearly of the opinion that the Anton Piller order ought not to have been granted. We are further of the opinion that the order made by the learned Judge for the return and destruction of the documents removed by the appellants from the respondents' premises was substantially justified. We varied it only in two respects. First, we directed that the documents which are copies made from documents removed by the appellants from the respondents' business premises and which, since the order, have been in the possession of the respondents' solicitors ought not to be destroyed but be kept for discovery in the accounting proceedings which are pending before the Registrar. Second, the learned Judge should not have ordered an assessment of damages in the enforcement of the cross-undertaking by the appellants; that question should have been left for disposal at the trial of the action: see *Booker v. Plascow* [1958] RPC 425 at 435 and *Dormeuil Freres S.A. v. Nicolian International (Textiles) Ltd.* [1988] 3 All ER 197 at 201. In this case, however, the action has never proceeded to trial. The appellants succeeded in obtaining summary judgment against the respondents. In the circumstances, an order as to assessment of damages in the enforcement of the cross-undertaking is not appropriate. Accordingly, we discharged that order.

As the appellants have not substantially succeeded before us, it is only fair that they should bear half the costs of the appeal, and we so ordered.

Also found at [1991] 3 CLJ 2644